



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

January 28, 2003

Ms. Paula J. Alexander  
General Counsel  
Metropolitan Transit Authority of Harris County  
P.O. Box 61429  
Houston, Texas 77208-1429

OR2003-0593

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175748.

The Metropolitan Transit Authority of Harris County (the "authority") received two requests from the same requestor. One seeks the "closing date" of a particular job posting; the other requests information about the total number of employees in the risk management division who received formal written counseling during a specified time period. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we address the authority's responsibilities under chapter 552 of the Government Code. "The [Public Information] Act requires governmental entities to disclose public information unless specifically excepted by law. *See* Tex. Gov't Code Ann. §§ 552.021, .101." *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 480 (Tex. App.—Austin 1997, no pet.). If a governmental body wishes to withhold information that it believes is excepted from public disclosure, it must request an opinion from this office in accordance with section 552.301 of the Government Code. *See* Gov't Code § 552.301(a).

Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request for information. In addition, section 552.301(e) requires a governmental body to submit within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

In one of the present requests, the requestor refers to a request he made "dated June 11, 2002," in which he sought the same closing date at issue here. The current request indicates that the authority responded to the June 11 request but failed to provide the closing date. In conjunction with its request for a ruling in Open Records Letter No. 2002-7391 (2002), the authority submitted for informational purposes a request dated June 11, 2002 and stamped "received" on June 13, 2002, in which this same requestor asked for the "closing date" of this same job posting. You do not inform us and our records do not reflect that the authority sought a decision from this office concerning the request for the "closing date" that was received on June 13. We therefore conclude that the authority failed to comply with section 552.301 in requesting a decision seeking to withhold the "closing date" at issue.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.103 is a discretionary exception that protects a governmental body's interests and may be waived. As such, it does not provide a compelling reason to withhold information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). We therefore conclude that the closing date of the specified job posting must be released to the requestor.

We now address your arguments regarding section 552.103 for the remaining information. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A government body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the government body receives the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). In Open Records Decision No. 336 (1982), this office concluded that litigation was reasonably anticipated when a potential opposing party filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). You have submitted information to this office showing that prior to the date of the request for information, the requestor filed a complaint with the Texas Commission on Human Rights (the "TCHR") alleging discrimination on the basis of race, age, and national origin. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The EEOC defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.* Therefore, we agree that you have established that litigation was reasonably anticipated. We also find that the submitted information is related to the anticipated litigation for purposes of section 552.103(a). Thus, you may withhold the remaining submitted information pursuant to section 552.103 of the Government Code.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the closing date for the specified job posting must be released. The remaining submitted information may be withheld pursuant to section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

*Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

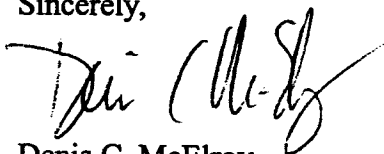
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 175748

Enc. Submitted documents

c: Mr. Ed Blakemore  
1660 West T.C. Jester, Apt. 610  
Houston, Texas 77008  
(w/o enclosures)